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Animals–Property or Persons?

Gary L. Francione*

*Rutgers University School of Law–Newark, gfrancione@earthlink.net

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Abstract

When it comes to our moral and legal obligations to nonhuman animals, we suffer from "moral schizophrenia." We claim to recognize that animals have morally significant interests in not suffering and that it is morally wrong to inflict "unnecessary" suffering on animals. Although we have laws that purport to reflect these moral sentiments, the overwhelming portion of the pain, suffering, and death that we impose on animals cannot be regarded as necessary in any sense. Our moral schizophrenia is related to the status of animals as property, which means that, as a practical matter, animal suffering will be regarded as necessary whenever it benefits human property owners. If we really are to take animal interests seriously, we can no longer treat animals as human resources. This does not mean that we must give animals the rights that we accord to humans, or that we cannot choose human interests over animal interests in situations of genuine conflict. Rather, we must recognize that animals have one right–the right not to be treated as property, and we cannot create conflicts between human and animals by using animals in ways in which we would never use any humans. As long as animals are human property, the principle of equal consideration can never apply to them (just as it could not apply to slaves), and animals will necessarily remain as nothing more than things that possess no morally significant interests. The theory presented applies to any animal that is sentient and does not require that animals have any additional cognitive characteristics.

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When it comes to other animals, we humans exhibit what can best be described as moral schizophrenia. Although we claim to take animals seriously and to regard them as having morally significant interests, we routinely ignore those interests whenever it benefits us. In this essay, I argue that our moral schizophrenia is related to the status of animals as property, which means that animals are nothing more than *things* despite the many laws that supposedly protect them. If we are going to make good on our claim to take animal interests seriously, then we have no choice but to accord animals one right: the right not to be treated as our property.

Our acceptance that animals have this one right would require that we abolish and not merely better regulate our institutionalized exploitation of animals. Although this is an ostensibly radical conclusion, it necessarily follows from certain moral notions that we have professed to accept for the better part of 200 years. Moreover, recognition of this right would not preclude our choosing humans over animals in situations of genuine conflict.

Animals: Our Moral Schizophrenia

There is a profound disparity between what we say we believe about animals, and how we actually treat them. On one hand, we claim to take animals seriously. Two-thirds of Americans polled by the Associated Press agree with the following statement: "An animal's right to live free of suffering should be just as important as a person's right to live free of suffering," and more than 50 percent of Americans believe that it is wrong to kill animals to make fur coats or to hunt

them for sport.[1] Almost 50 percent regard animals to be "just like humans in all important ways."[2] These attitudes are reflected in other nations as well. For example, 94 percent of Britons[3] and 88 percent of Spaniards[4] think that animals should be protected from acts of cruelty, and only 14 percent of Europeans support the use of genetic engineering that results in animal suffering, even if the purpose is to create drugs that would save human lives.[5]

On the other hand, our actual treatment of animals stands in stark contrast to our proclamations about our regard for their moral status.[6] Consider the suffering of animals at our hands. In the United States alone, according to the U.S. Department of Agriculture, we kill more than 8 billion animals a year for food; every day, we slaughter approximately 23 million animals, or more than 950,000 per hour, or almost 16,000 per minute, or more than 260 every second. This is to say nothing of the billions more killed worldwide. These animals are raised under horrendous intensive conditions known as "factory farming," mutilated in various ways without pain relief, transported long distances in cramped, filthy containers, and finally slaughtered amid the stench, noise, and squalor of the abattoir. We kill billions of fish and other sea animals annually. We catch them with hooks and allow them to suffocate in nets. We buy lobsters at the supermarket, where they are kept for weeks in crowded tanks with their claws closed by rubber bands and without receiving any food, and we cook them alive in boiling water.

Wild animals fare no better. We hunt and kill approximately 200 million animals in the United States annually, not including animals killed on commercial

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1. David Foster, "Animal Rights Activists Getting Message Across: New Poll Findings Show Americans More in Tune with 'Radical' Views," *Chicago Tribune*, Jan. 25, 1996, at C8.

2. John Balzer, "Creatures Great and—Equal," *L.A. Times*, Dec. 25, 1993, at A1.

3. Julie Kirkbride, "Peers Use Delays to Foil Hedgehog Cruelty Measure," *Daily Telegraph*, Nov. 3, 1995, at 12.

4. Edward Gorman, "Woman's Goring Fails to Halt Death in the Afternoon," *Times* (London), June 30, 1995, Home News Section.

5. Malcolm Eames, "Four Legs Very Good," *Guardian*, Aug. 25, 1995, at 17.

6. For sources discussing the numbers of animals used for various purposes, see Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?*, at xx–xxi (2000).

game ranches or at events such as pigeon shoots. Moreover, hunters often cripple animals without killing or retrieving them. It is estimated, for example, that bow hunters do not retrieve 50 percent of the animals hit with their arrows. This increases the true death toll from hunting by at least tens of millions of uncounted animals. Wounded animals often die slowly, over a period of hours or even days, from blood loss, punctured intestines and stomachs, and severe infections.

In the United States alone, we use millions of animals annually for biomedical experiments, product testing, and education. Animals are used to measure the effects of toxins, diseases, drugs, radiation, bullets, and all forms of physical and psychological deprivations. We burn, poison, irradiate, blind, starve, and electrocute them. They are purposely riddled with diseases such as cancer and infections such as pneumonia. We deprive them of sleep, keep them in solitary confinement, remove their limbs and eyes, addict them to drugs, force them to withdraw from drug addiction, and cage them for the duration of their lives. If they do not die during experimental procedures, we almost always kill them immediately afterward, or we recycle them for other experiments or tests and then kill them.

We use millions of animals for the sole purpose of providing entertainment. Animals are used in film and television. There are thousands of zoos, circuses, carnivals, race tracks, dolphin exhibits, and rodeos in the United States, and these and similar activities, such as bullfighting, also take place in other countries. Animals used in entertainment are often forced to endure lifelong incarceration and confinement, poor living conditions, extreme physical danger and hardship, and brutal treatment. Most animals used for entertainment purposes are killed when no longer useful, or sold into research or as targets for shooting on commercial hunting preserves.

And we kill millions of animals annually simply for fashion. Approximately 40 million animals worldwide are trapped, snared, or raised in intensive confinement on fur farms, where they are electrocuted or gassed or have

their necks broken. In the United States, 8–10 million animals are killed every year for fur.

For all of these reasons, we may be said to suffer from a sort of moral schizophrenia when it comes to our thinking about animals. We claim to regard animals as having morally significant interests, but our behavior is to the contrary.

Animals as Things

Before the nineteenth century, the foregoing litany of animal uses would not have raised any concern. Western culture did not recognize that humans had any moral obligations to animals because animals did not matter morally at all. We could have moral obligations that concerned animals, but these obligations were really owed to other humans and not to animals. Animals were regarded as things, as having a moral status no different from that of inanimate objects.

As late as the seventeenth century, the view was advanced that animals are nothing more than machines. René Descartes (1596–1650), considered the founder of modern philosophy, argued that animals are not conscious—they have no mind whatsoever—because they do not possess a soul, which God invested only in humans. In support of the idea that animals lack consciousness, Descartes maintained that they do not use verbal or sign language—something that every human being does but that no animal does. Descartes certainly recognized that animals act in what appear to be purposive and intelligent ways and that they seem to be conscious, but he claimed that they are really no different from machines made by God. Indeed, he likened animals to "automatons, or moving machines."[7] Moreover, just as a clock can tell time better than humans can, so some animal machines can perform some tasks better than humans can.

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7. René Descartes, "Discourse on the Method," pt. V, *in* 1 *The Philosophical Writings of Descartes* 111, 139 (John Cottingham, Robert Stoothoff, & Dugald Murdoch trans., Cambridge Univ. Press 1985) (1637). Some scholars have argued that Descartes did recognize animal consciousness in certain respects, and that traditional interpretations of Descartes are incorrect. *See, e.g.*, Daisie Radnor & Michael Radnor, *Animal Consciousness* (1989). There is, however, no doubt that Descartes regarded animals as morally indistinguishable from inanimate objects and, to the extent that he viewed animals as conscious and as having interests in not suffering, he ignored those interests.

An obvious implication of Descartes's position was that animals are not sentient; they are not conscious of pain, pleasure, or anything else. Descartes and his followers performed experiments in which they nailed animals by their paws to boards and cut them open to reveal their beating hearts. They burned, scalded, and mutilated animals in every conceivable manner. When the animals reacted as though they were suffering pain, Descartes dismissed the reaction as no different from the sound of a machine that is functioning improperly. A crying dog, Descartes maintained, is no different from a whining gear that needs oil.

In Descartes's view, it is as senseless to talk about our moral obligations to animals, machines created by God, as it is to talk about our moral obligations to clocks, machines created by humans. We can have moral obligations that concern the clock, but any such obligations are really owed to other humans and not to the clock. If I smash the clock with a hammer, you may object because the clock belongs to you, or because I injure you when a piece of the clock accidentally strikes you, or because it is wasteful to destroy a perfectly good clock that could be used by someone else. I may be similarly obliged not to damage your dog, but the obligation is owed to you, not to the dog. The dog, like the clock, according to Descartes, is nothing more than a machine and possesses no interests in the first place.

There were others who did not share Descartes's view that animals are merely machines but who still denied that we can have any moral obligations to animals. For example, the German philosopher Immanuel Kant (1724–1804) recognized that animals are sentient and can suffer, but denied that we can have any direct moral obligations to them because, according to Kant, they are neither rational nor self-aware. According to Kant, animals are merely a means to human ends; they are "man's instruments." They exist only for our use and have no value in themselves. To the extent that our treatment of animals matters at all for Kant, it does so only because of its impact on other humans: "[H]e who is cruel to

animals becomes hard also in his dealings with men."[8] Kant argued that if we shoot and kill a faithful and obedient dog because the dog has grown old and is no longer capable of serving us, our act violates no obligation that we owe to the dog. The act is wrong only because of our moral obligation to reward the faithful service of other humans; killing the dog tends to make us less inclined to fulfill these human obligations. "[S]o far as animals are concerned, we have no direct duties." Animals exist "merely as a means to an end. That end is man."[9]

The view that we have no direct moral obligations to animals was also reflected in Anglo-American law. Before the nineteenth century, it is difficult to find any statutory recognition of legal obligations owed directly to animals.[10] To the extent that the law provided animals any protection, it was, for the most part, couched solely in terms of human concerns, primarily property interests. If Simon injured Jane's cow, Simon's act might violate a malicious mischief statute if it could be proved that the act manifested malice toward Jane. If Simon had malice toward the cow but not toward Jane, then he could not be prosecuted. It was irrelevant whether Simon's malice was directed toward Jane's cow or toward her inanimate property. Any judicial condemnation of animal cruelty was, with rare exceptions, expressed only as concern that such conduct would translate into cruelty to other humans, or that acts of cruelty to animals might offend public decency and cause a breach of the peace. That is, the law reflected the notion expressed by Kant and others that if there were any reason for us to be kind to animals, it had nothing to do with any obligation that we owed to animals, but only with our obligations to other humans.

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8. Immanuel Kant, *Lectures on Ethics* 240 (Louis Infield trans., Harper Torchbooks, 1963).

9. *Id.* at 239. There were others, such as Aristotle, St. Thomas Aquinas, and John Locke, who recognized that animals are sentient but who claimed that they lack characteristics such as rationality or abstract thought, and we could, therefore, treat them as things. *See* Francione, *supra* note 6, at 103–29. *See also* notes 74–97 and accompanying text.

10. A possible exception is the 1641 legal code of the Massachusetts Bay Colony, which prohibited cruelty to domestic animals. *See* Gary L. Francione, *Animals, Property, and the Law* 121 (1995). It is not clear whether this provision prohibited cruelty at least in part out of concern for the animals themselves, or only because cruelty to animals might adversely affect humans.

The Humane Treatment Principle: A Rejection of Animals as Things

Consider the following example. Simon proposes to torture a dog by burning the dog with a blowtorch. Simon's only reason for torturing the dog is that he derives pleasure from this sort of activity. Does Simon's proposal raise any moral concern? Is Simon violating some moral obligation not to use the animal in this way for his amusement? Or is Simon's action morally no different from crushing and eating a walnut?

I think that most of us would not hesitate to maintain that blowtorching the dog simply for pleasure is not a morally justifiable act under any circumstances. What is the basis of our moral judgment? Is it merely that we are concerned about the effect of Simon's action on other humans? Do we object to the torture of the dog merely because it might upset other humans who like dogs? Do we object because by torturing the dog Simon may become a more callous or unkind person in his dealings with other humans? We may very well rest our moral objection to Simon's action in part on our concern for the effect of his action on other humans, but that is not our primary reason for objecting. After all, we would condemn the act even if Simon tortures the animal in secret, or even if, apart from his appetite for torturing dogs, Simon is a charming fellow who shows only kindness to other humans.

Suppose that the dog is the companion animal of Simon's neighbor, Jane. Do we object to the torture because the dog is Jane's property? We may very well object to Simon's action because the dog belongs to Jane, but again, that is not our first concern. We would find Simon's action objectionable even if the dog were a stray.

The primary reason that we find Simon's action morally objectionable is its direct effect on the dog. The dog is sentient; like us, the dog is the sort of being who has the capacity to suffer and has an interest in not being blowtorched.[11] The

11. The neurological and physiological similarities between humans and nonhumans render the fact of animal sentience noncontroversial. Even mainstream science accepts that animals are sentient. For example, the U.S. Public Health Service states that "[u]nless the contrary is established, investigators should consider that procedures that cause pain or distress in human

dog prefers, or wants, or desires not to be blowtorched. We have an obligation—one owed directly to the dog and not merely one that concerns the dog—not to torture the dog. The sole ground for this obligation is that the dog is sentient; no other characteristic, such as humanlike rationality, reflective self-consciousness, or the ability to communicate in a human language, is necessary. We regard it as morally necessary to justify our infliction of harm on the dog simply because the dog can experience pain and suffering, We may disagree about whether a particular justification suffices, but we all agree that some justification is required, and Simon's pleasure cannot constitute such a justification. An integral part of our moral thinking is the idea that, other things being equal, the fact that an action causes pain counts as a reason against that action, not merely because imposing harm on another sentient being somehow diminishes us, but because imposing harm on another sentient being is wrong in itself. And it does not matter whether Simon proposes to blowtorch for pleasure the dog or another animal, such as a cow. We would object to his conduct in either case.

In short, most of us claim to reject the characterization of animals as things that has dominated Western thinking for many centuries. For the better part of 200 years, Anglo-American moral and legal culture has made a distinction between sentient creatures and inanimate objects. Although we believe that we ought to prefer humans over animals when interests conflict, most of us accept as completely uncontroversial that our use and treatment of animals are guided by what we might call the *humane treatment principle*, or the view that because animals can suffer, we have a moral obligation that we owe directly to animals not to impose unnecessary suffering on them.

The humane treatment principle finds its origins in the theories of English lawyer and utilitarian philosopher Jeremy Bentham (1748–1832). Bentham

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beings may cause pain or distress in other animals." U.S. Department of Health and Human Services, National Institutes of Health, "Public Health Service Policy and Government Principles Regarding the Care and Use of Animals," *in Institute of Laboratory Animal Resources, Guide for the Care and Use of Laboratory Animals* 117 (1996).

argued that despite any differences, humans and animals are similar in that they both can suffer, and it is only the capacity to suffer and not the capacity for speech or reason or anything else that is required for animals to matter morally and to have legal protection. Bentham maintained that animals had been "degraded into the class of *things*," with the result that their interest in not suffering had been ignored.[12] In a statement as profound as it was simple, Bentham illuminated the irrelevance of characteristics other than sentience: "[A] full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they*talk* ? but, Can they *suffer*?"[13]

Bentham's position marked a sharp departure from a cultural tradition that had never before regarded animals as other than things devoid of morally significant interests. He rejected the views of those, like Descartes, who maintained that animals are not sentient and have no interests. He also rejected the views of those, like Kant, who maintained that animals have interests but that those interests are not morally significant because animals lack characteristics other than sentience, and that our treatment of animals matters only to the extent that it affects our treatment of other humans. For Bentham, our treatment of animals matters because of its effect on beings that can suffer, and our duties are owed directly to them. Bentham urged the enactment of laws to protect animals from suffering.

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12. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ch. XVII, para. 4, at 282 (footnote omitted) (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1781). I do not mean to suggest that Bentham was the first person ever to express a concern about animal suffering distinct from its effect on human character, nor that he was the only or the first to argue that humans and animals have morally significant interests in not suffering. Several years before Bentham, Rev. Humphry Primatt expressed the view that suffering was an evil irrespective of species. *See* Humphry Primatt, *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals* (London, T. Cadell 1776). Bentham clearly had a greater impact on both moral and legal thinking concerning the issue.

13. Bentham, *supra* note 12, at 282–83 n.b.

Bentham's views had a profound effect on various legal reformers, and the result was that the legal systems of the United States and Britain (as well as other nations) purported to incorporate the humane treatment principle in animal welfare laws. These laws are of two kinds: general and specific. General animal welfare laws, such as anticruelty laws, prohibit cruelty or the infliction of unnecessary suffering on animals without distinguishing between various uses of animals. For example, New York law imposes a criminal sanction on any person who "overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal."[14] Delaware law prohibits cruelty and defines as cruel "every act or omission to act whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted," and includes "mistreatment of any animal or neglect of any animal under the care and control of the neglector, whereby unnecessary or unjustifiable physical pain or suffering is caused."[15] In Britain, the Protection of Animals Act of 1911 makes it a criminal offense to "cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate, or terrify any animal" or to impose "unnecessary suffering" on animals.[16] Specific animal welfare laws purport to apply the humane treatment principle to a particular animal use. For example, the American Animal Welfare Act, enacted in 1966 and amended on numerous occasions,[17] the British Cruelty to Animals Act, enacted in 1876,[18] and the British Animals (Scientific Procedures) Act of 1986[19] concern the treatment of animals used in experiments.

14. N.Y. Agric. & Mkts. Law § 353 (Consol. 2002). The first known anticruelty statute in the United States was passed in Maine in 1821. New York passed a statute in 1829, but New York courts held as early as 1822 that cruelty was an offense at common law.

15. Del. Code. Ann., tit. 11, §§ 1325(a)(1) & (4) (2002).

16. Protection of Animals Act, 1911, ch. 27 § 1(1)(a) (Eng.). British legislation prohibiting cruelty to animals was passed as early as 1822.

17. 7 U.S.C. §§ 2131–2159 (2003).

18. Cruelty to Animals Act, 1876 (Eng.).

19. Animals (Scientific Procedures) Act, 1986 (Eng.).

The American Humane Slaughter Act, originally enacted in 1958, regulates the killing of animals used for food.[20]

As we saw earlier, if Simon injured Jane's cow, malicious mischief statutes required a showing that Simon bore malice toward Jane. To the extent that courts had any concern about cruelty to animals, this concern was limited to the effect that cruelty might have on public sensibilities or on the tendency of cruelty to animals to encourage cruelty to other humans. The passage of anticruelty laws allowed for Simon's prosecution even if he bore Jane no ill will and instead intended malice only to her cow. Moreover, these laws reflect concern about the moral significance of animal suffering, in addition to the detrimental repercussions of cruelty to animals for humans. Anticruelty laws are often explicit in applying to all animals, whether owned or unowned. Thus, whereas malicious mischief statutes were "intended to protect the beasts as property instead of as creatures susceptible of suffering," anticruelty statutes are "designed for the protection of animals."[21] They are intended "for the benefit of animals, as creatures capable of feeling and suffering, and [are] intended to protect them from cruelty, without reference to their being property."[22] The purpose of these laws is, in part, to instill in humans "a humane regard for the rights and feelings of the brute creation by reproving the evil and indifferent tendencies in human nature in its intercourse with animals."[23] They are said to "recognize and attempt to protect some abstract rights in all that animate creation, made subject to man by the creation, from the largest and noblest to the smallest and most insignificant."[24] Anticruelty laws acknowledge that because animals are sentient, we have legal obligations that we owe directly to animals to refrain from imposing unnecessary pain and suffering on them: "Pain is an evil," and "[i]t is impossible for a right

20. 7 U.S.C. §§ 1901–1907 (2003).

21. State v. Prater, 109 S.W. 1047, 1049 (Mo. Ct. App. 1908).

22. Stephens v. State, 65 Miss. 329, 331 (1887).

23. Hunt v. State, 29 N.E. 933, 933 (Ind. Ct. App. 1892).

24. Grise v. State, 37 Ark. 456, 458 (1881).

minded man . . . to say that unjustifiable cruelty [to animals] is not a wrong."[25] Other animal welfare laws similarly focus on the suffering of animals as intrinsically undesirable.[26]

Many animal welfare laws, such as anticruelty statutes, are criminal laws. For the most part, only those moral rules that are widely accepted, such as prohibitions against killing other humans, inflicting physical harm on them, or taking or destroying their property, are enshrined in criminal laws. That many animal welfare laws are criminal laws suggests that we take animal interests seriously enough to punish violations of the humane treatment principle with the social stigma of a criminal penalty.

The humane treatment principle and the operation of the animal welfare laws that reflect it purport to require that we balance the interests of animals against our interests as humans in order to determine whether animal suffering is necessary. To balance interests means to assess the relative strengths of conflicting interests. If our suffering in not using animals outweighs the animal interest in not suffering, then our interests prevail, and the animal suffering is regarded as necessary. If no justifiable human interests are at stake, then the infliction of suffering on animals must be regarded as unnecessary. For example, the British law regulating the use of animals in experiments requires, before any experiment is approved, a balancing of "the likely adverse effects on the animals concerned against the benefit likely to accrue."[27]

In sum, the principle assumes that we may use animals when it is necessary to do so—when we are faced with a conflict between animal and human interests—and that we should impose only the minimum amount of pain and suffering necessary to achieve our purpose. If a prohibition against unnecessary suffering of animals is to have any meaningful content, it must preclude the

25. People v. Brunell, 48 How. Pr. 435, 437 (N.Y. City Ct. 1874).

26. *See*, *e.g.*, Francione, *supra* note 10, at 193 (discussing the federal Animal Welfare Act).

27. Animals (Scientific Procedures) Act, 1986, ch. 14, § 5(4) (Eng.).

infliction of suffering on animals merely for our pleasure, amusement, or convenience. If there is a feasible alternative to our use of animals in a particular situation, then the principle would seem to proscribe such use.

The Problem: Unnecessary Suffering

Although we express disapproval of the unnecessary suffering of animals, nearly all of our animal use can be justified *only* by habit, convention, amusement, convenience, or pleasure.[28] To put the matter another way, most of the suffering that we impose on animals is completely unnecessary, and we are not substantially different from Simon, who proposes to blowtorch the dog for pleasure. For example, the uses of animals for sport hunting and entertainment purposes cannot, by definition, be considered necessary. Nevertheless, these activities are protected by laws that supposedly prohibit the infliction of unnecessary suffering on animals. It is certainly not necessary for us to wear fur coats, or to use animals to test duplicative household products, or to have yet another brand of lipstick or aftershave lotion.

More important in terms of numbers of animals used, however, is the animal agriculture industry, in which billions of animals are killed for food annually. It is not necessary in any sense to eat meat or animal products; indeed, an increasing number of health care professionals maintain that these foods may be detrimental to human health. Moreover, respected environmental scientists have pointed out the tremendous inefficiencies and resulting costs to our planet of animal agriculture. For example, animals consume more protein than they produce. For every kilogram (2.2 pounds) of animal protein produced, animals consume an average of almost 6 kilograms, or more than 13 pounds, of plant protein from grains and forage. It takes more than 100,000 liters of water to produce one kilogram of beef, and approximately 900 liters to produce one kilogram of wheat. In any event, our only justification for the pain, suffering, and

28. For a discussion about the necessity of various animal uses, see Francione, *supra* note 6, at 9–49. *See also* Stephen R.L. Clark, *The Moral Status of Animals* (1977) (arguing that much animal use cannot be regarded as necessary).

death inflicted on these billions of farm animals is that we enjoy the taste of their flesh.

Although many regard the use of animals in experiments as involving a genuine conflict of human and animal interests, the necessity of animal use for this purpose is open to serious question as well. Considerable empirical evidence challenges the notion that animal experiments are necessary to ensure human health and indicates that, in many instances, reliance on animal models has actually been counterproductive.

Animals as Property: An Unbalanced Balance

The profound inconsistency between what we say about animals and how we actually treat them is related to the status of animals as our property.[29] Animals are commodities that we own and that have no value other than that which we, as property owners, choose to give them. Although Bentham changed moral thinking and legal doctrine by introducing the idea that sentience is the only characteristic required for animals to matter, neither he nor the reformers interested in incorporating his views into law ever questioned the property status of animals.[30] Under the law, "animals are owned in the same way as inanimate objects such as cars and furniture."[31] They "are by law treated as any other form of movable property and may be the subject of absolute, *i.e.*, complete ownership . . . [and] the owner has at his command all the protection that the law provides in respect of absolute ownership."[32] The owner is entitled to exclusive physical possession of

29. *See generally* Francione, *supra* note 10 (discussing the status of animals as property as a general matter, and in the context of anticruelty laws and the federal Animal Welfare Act). The status of animals as property has existed for thousands of years. Indeed, historical evidence indicates that the domestication of animals is closely related to the development of the concepts of property and money. The property status of animals is particularly important in Western culture for two reasons. First, property rights are accorded a special status and are considered to be among the most important rights we have. Second, the modern Western concept of property, whereby resources are regarded as separate objects that are assigned and belong to particular individuals who are allowed to use the property to the exclusion of everyone else, has its origin in God's grant to humans of dominion over animals. *See id.* at 24–49; Francione, *supra* note 6, at 50–54.

30. *See infra* notes 75–81 and accompanying text.

31. Godfrey Sandys-Winsch, *Animal Law* 1 (1978).

32. T.G. Field-Fisher, *Animals and the Law* 19 (1964).

the animal, the use of the animal for economic and other gain, and the right to make contracts with respect to the animal or to use the animal as collateral for a loan. The owner is under a duty to ensure that her animal property does not harm other humans or their property, but she can sell or bequeath the animal, give the animal away, or have the animal taken from her as part of the execution of a legal judgment against her. She can also kill the animal. Wild animals are generally regarded as owned by the state and held in trust for the benefit of the people, but they can be made the property of particular humans through hunting or by taming and confining them.

The property status of animals renders meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property. It is, of course, absurd to suggest that we can balance human interests, which are protected by claims of right in general and of a right to own property in particular, against the interests of property, which exists only as a means to the ends of humans. Although we claim to recognize that we may prefer animal interests over human interests only when there is a conflict of interests, there is always a conflict between the interests of property owners who want to use their property and the interests of their animal property. The human property interest will almost always prevail. The animal in question is always a "pet" or a "laboratory animal," or a "game animal," or a "food animal," or a "rodeo animal," or some other form of animal property that exists solely for our use and has no value except that which we give it. There is really no choice to be made between the human and the animal interest because the choice has already been predetermined by the property status of the animal; the "suffering" of property owners who cannot use their property as they wish counts more than animal suffering. We are allowed to impose any suffering required to use our animal property for a particular purpose even if that purpose is our mere

amusement or pleasure. As long as we use our animal property to generate an economic benefit, there is no effective limit on our use or treatment of animals.[33]

There are several specific ways in which animal welfare laws ensure that there will never be a meaningful balance of human and animal interests. First, many of these laws explicitly exempt most forms of institutionalized property use, which account for the largest number of animals that we use. The most frequent exemptions from state anticruelty statutes involve scientific experiments, agricultural practices, and hunting.[34] The Animal Welfare Act, the primary federal law that regulates the use of animals in biomedical experiments, does not even apply to most of the animals used in experiments—rats and mice—and imposes no meaningful limits on the amount of pain and suffering that may be inflicted on animals in the conduct of experiments.[35]

Second, even if anticruelty statutes do not do so explicitly, courts have effectively exempted our common uses of animals from scrutiny by interpreting these statutes as not prohibiting the infliction of even extreme suffering if it is incidental to an accepted use of animals and a customary practice on the part of animal owners.[36] An act "which inflicts pain, even the great pain of mutilation, and which is cruel in the ordinary sense of the word" is not prohibited "[w]henever the purpose for which the act is done is to make the animal more serviceable for the use of man."[37] For example, courts have held consistently that animals used for food may be mutilated in ways that unquestionably cause severe pain and suffering and that would normally be regarded as cruel or even as torture. These practices are permitted, however, because animal agriculture is an accepted institutionalized animal use, and those in the meat industry regard the

33. To the extent that animal uses, such as certain types of animal fighting, have been prohibited, this may be understood more in terms of class hierarchy and cultural prejudice than in terms of moral concern about animals. *See* Francione, *supra* note 10, at 18.

34. *See id.* at 139–42.

35. *See id.* at 224. For a discussion of the Animal Welfare Act, see *id.* at 185–249.

36. *See id.* at 142–56; Francione, *supra* note 6, at 58–63.

37. Murphy v. Manning, 2 Ex. D. 307, 313, 314 (1877) (Cleasby, B.).

practices as normal and necessary to facilitate that use. Courts often presume that animal owners will act in their best economic interests and will not intentionally inflict more suffering than is necessary on an animal because to do so would diminish the monetary value of the animal.[38] For example, in *Callaghan v. Society for the Prevention of Cruelty to Animals*, the court held that the painful act of dehorning cattle did not constitute unnecessary abuse because farmers would not perform this procedure if it were not necessary. The self-interest of the farmer would prevent the infliction of "useless pain or torture," which "would necessarily reduce the condition of the animal; and, unless they very soon recovered, the farmer would lose in the sale."[39]

Third, anticruelty laws are generally criminal laws and the state must prove beyond a reasonable doubt that a defendant engaged in an unlawful act with a culpable state of mind. The problem is that if a defendant is inflicting pain or suffering on an animal as part of an accepted institutionalized use of animals, it is difficult to prove that she acted with the requisite mental state to justify criminal liability.[40] For example, in *Regalado v. United States*,[41] Regalado was convicted of violating the anticruelty statute of the District of Columbia for beating a puppy. Regalado appealed, claiming that he did not intend to harm the puppy and inflicted the beating only for disciplinary purposes. The court held that anticruelty statutes were "not intended to place unreasonable restrictions on the infliction of such pain as may be necessary for the training or discipline of an animal" and that

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38. *See* Francione, *supra* note 10, at 127–28; Francione, *supra* note 6, at 66–67. This presumption not only insulates customary practices from being found to violate anticruelty laws, but also militates against finding the necessary criminal intent in cases involving noncustomary uses. *See, e.g.*, Commonwealth v. Barr, 44 Pa. C. 284 (Lancaster County Ct. 1916). *See infra* notes 40–43 and accompanying text.

39. 16 L.R.Ir. 325, 335 (C.P.D. 1885) (Murphy, J.). In Britain, the dehorning of older cattle was found to violate the anticruelty statute but only because dehorning had been discontinued and was no longer an accepted agriculture practice. *See* Ford v. Wiley, 23 Q.B. 203 (1889). In his opinion, Hawkins, J., noted that the fact that the practice had been abandoned by farmers who were acting in their economic self-interest was proof that the practice was unnecessary. *See id.* at 221–22.

40. *See* Francione, *supra* note 10, at 135–39; Francione, *supra* note 6, at 63–66.

41. 572 A.2d 416 (D.C. 1990).

the statute only prohibited acts done with malice or a cruel disposition.[42] Although the court affirmed Regalado's conviction, it recognized that "proof of malice will usually be circumstantial, and the line between discipline and cruelty will often be difficult to draw."[43]

Fourth, many animal welfare laws have wholly inadequate penalty provisions, and we are reluctant, in any event, to impose the stigma of criminal liability on animal owners for what they do with their property.[44] Moreover, those without an ownership interest generally do not have standing to bring legal challenges to the use or treatment of animals by their owners.[45]

As the foregoing makes clear, because animals are property, we do not balance interests to determine whether it is necessary to use animals at all for particular purposes. We simply assume that it is appropriate to use animals for food, recreation, entertainment, clothing, or experiments—the primary ways in which we use animals as commodities to generate social wealth and most of which cannot be described plausibly as involving any genuine conflict of human and animal interests. Animal welfare laws do not even apply to many of these uses. To the extent that we do ask whether the imposition of pain and suffering is necessary, the inquiry is limited to whether particular treatment is in compliance with the customs and practices of property owners who, we assume, will not inflict more pain and suffering on their animal property than is required for the purpose. The only way to characterize this process is as a "balancing" of the property owner's interest in using animal property against the interest of an animal in not being used in ways that fail to comply with those customs and practices. Although animal welfare laws are intended to protect the interests of

42. *Id.* at 420.

43. *Id.* at 421.

44. *See* Francione, *supra* note 10, at 156; Francione, *supra* note 6, at 67–68. In recent years, many states have amended their anticruelty laws and have increased penalties for at least certain violations. It remains to be seen whether this will make any real difference because most animal uses will remain exempt and there will still be problems with proof of criminal intent.

45. *See* Francione, *supra* note 10, at 65–90, 156–58; Francione, *supra* note 6, at 69–70.

animals without reference to their being property, animal interests are protected only insofar as they serve the goal of rational property use.[46]

Our infliction of suffering on animals raises a legal question only when it does not conform to the customs and practices of those institutions—when we intentionally inflict suffering in ways that do not maximize social wealth, or when the only explanation for the behavior can be characterized as "the gratification of a malignant or vindictive temper."[47] For example, in *State v. Tweedie*,[48] the defendant was found to have violated the anticruelty law by killing a cat in a microwave oven. *In re William G.*[49] upheld a cruelty conviction where a minor kicked a dog and set her on fire because she would not mate with his dog. In *Motes v. State*,[50] the defendant was found guilty of violating the anticruelty statute when he set fire to a dog merely because the dog was barking. In *Tuck v. United States*,[51] a pet shop owner was convicted of cruelty when he placed animals in an unventilated display window and refused to remove a rabbit whose body temperature registered as high as the thermometer was calibrated—110 degrees Fahrenheit. In *People v. Voelker*,[52] the court held that cutting off the heads of three live, conscious iguanas "without justification" could constitute a violation of the anticruelty law. In *LaRue v. State*,[53] a cruelty conviction was upheld because the defendant collected a large number of stray dogs and failed to provide them with veterinary care; the dogs suffered from mange, blindness, dehydration, pneumonia, and distemper and had to be killed. In *State v. Schott*,[54] Schott was

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46. *See* Francione, *supra* note 10, at 27–32.

47. Commonwealth v. Lufkin, 89 Mass. (7 Allen) 579, 581 (1863). *See* Francione, *supra* note 10, at 137–38, 153–56; Francione, *supra* note 6, at 70–73.

48. 444 A.2d 855 (R.I. 1982).

49. 447 A.2d 493 (Md. Ct. Spec. App. 1982).

50. 375 S.E.2d 893 (Ga. Ct. App. 1988).

51. 477 A.2d 1115 (D.C. 1984).

52. 172 Misc.2d 564 (N.Y. Crim. Ct. 1997).

53. 478 S.2d 13 (Ala. Crim. App. 1985).

54. 384 N.W.2d 620 (Neb. 1986).

convicted of cruelty to animals when police found dozens of cows and pigs dead or dying from malnutrition and dehydration on his farm. Schott's defense was that bad weather prevented him from caring for his livestock. The jury found Schott guilty of cruelty and neglect, and the appellate court affirmed. These are, however, unusual cases and constitute a minuscule fraction of the instances in which we inflict suffering on animals.

Moreover, the very same act may be either protected or prohibited depending only on whether it is part of an accepted institution of animal exploitation. If someone kills a cat in a microwave, sets a dog on fire, allows the body temperature of a rabbit to rise to the point of heat stroke, severs the heads of conscious animals, or allows animals to suffer untreated serious illnesses, the conduct may violate the anticruelty laws. But if a researcher engages in the exact same conduct as part of an experiment (and a number of researchers have killed animals or inflicted pain on them in the same and similar ways) the conduct is protected by the law because the researcher is supposedly using the animal to generate a benefit. A farmer may run afoul of the anticruelty law if she neglects her animals and allows them to suffer from malnutrition or dehydration for no reason, but she may mutilate her animals and raise them in conditions of severe confinement and deprivation, if she intends to sell them for food. The permitted actions cause as much if not more distress to animals as does neglecting them, but they are considered part of normal animal husbandry and are, therefore, protected under the law.

Thus, because animals are our property, the law will require their interests to be observed only to the extent that it facilitates their exploitation. This observation holds true even in countries where there is arguably a greater moral concern about animals. Britain, for instance, has more restrictions on animal use than does the United States, but the differences in permitted animal treatment are more formal than substantive. In discussing British animal welfare laws, one commentator has noted that "much of the animal welfare agenda has been obstructed and it is difficult to think of legislation improving the welfare of

animals that has seriously damaged the interests of the animal users."[55] The law may in theory impose regulations that go beyond the minimum level of care required to exploit animals, yet it has rarely done so, for there are significant economic and other obstacles involved.[56] Voluntary changes in industry standards of animal welfare generally occur only when animal users regard these changes as cost-effective.[57]

The status of animals as property renders meaningless our claim that we reject the status of animals as things. We treat animals as the moral equivalent of inanimate objects with no morally significant interests. We bring billions of animals into existence annually simply for the purpose of killing them. Animals have market prices. Dogs and cats are sold in pet stores like compact discs; financial markets trade in futures for pork bellies and cattle. Any interest that an animal has represents an economic cost that may be ignored to maximize overall social wealth and has no intrinsic value in our assessments. That is what it means to be property.

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55. Robert Garner, *Animals, Politics and Morality* 234 (1993).

56. *See* Francione, *supra* note 6, at 13, 73–76, 181–82. *See generally* Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (1996) [hereinafter, Francione, *Rain Without Thunder*] (discussing unsuccessful efforts by the animal protection movement to obtain animal welfare laws that exceed the minimal standards required to exploit animals).

57. For example, McDonald's, the fast-food chain, announced that it would require its suppliers to observe standards of animal welfare that went beyond current standards: "Animal welfare is also an important part of quality assurance. For high-quality food products at the counter, you need high quality coming from the farm. Animals that are well cared for are less prone to illness, injury, and stress, which all have the same negative impact on the condition of livestock as they do on people. Proper animal welfare practices also benefit producers. Complying with our animal welfare guidelines helps ensure efficient production and reduces waste and loss. This enables our suppliers to be highly competitive." Bruce Feinberg & Terry Williams, "McDonald's Corporate Social Responsibility, Animal Welfare Update: North America," *at* http://www.mcdonalds.com/corporate/social/marketplace/welfare/update/northamerica/index.html (last visited Dec. 1, 2003). The principal expert advisor to McDonald's states: "Healthy animals, properly handled, keep the meat industry running safely, efficiently and profitably." Temple Grandin, *Recommended Animal Handling Guidelines for Meat Packers* 1 (1991).

Taking Animal Interests Seriously: The Principle of Equal Consideration

We claim to accept that animals are not merely things. We may use animals when there is a conflict between human and animal interests that requires us to make a choice, but we have a moral obligation that we owe directly to animals not to inflict unnecessary suffering on them. Despite what we say, most of our animal use cannot be described as involving any conflict of interests, and we inflict extreme pain and suffering on animals in the process. Even if we treated animals better, that would still leave open the question of our moral justification for imposing any suffering at all if animal use is not necessary. We may, of course, decide to discard the humane treatment principle and acknowledge that we regard animals as nothing more than things without any morally significant interests. This option would at least spare us the need for thinking about our moral obligations to animals. We would not have any.

Alternatively, if we are to make good on our claim to take animal interests seriously, then we can do so in only one way: by applying the *principle of equal consideration*—the rule that we ought to treat like cases alike unless there is a good reason not to do so—to animals.[58] The principle of equal consideration is a necessary component of every moral theory. Any theory that maintains that it is permissible to treat similar cases in a dissimilar way would fail to qualify as an acceptable moral theory for that reason alone. Although there may be many differences between humans and animals, there is at least one important similarity that we all already recognize: our shared capacity to suffer. In this sense, humans and animals are similar to each other and different from everything else in the universe that is not sentient. If our supposed prohibition on the infliction of unnecessary suffering on animals is to have any meaning at all, then we must give equal consideration to animal interests in not suffering.

The suggestion that animal interests should receive equal consideration is not as radical as it may appear at first if we consider that the humane treatment

58. *See* Francione, *supra* note 6, at 81–102. A reason not to treat similar cases in a similar way must not be arbitrary and thereby itself violate the principle of equal consideration.

principle incorporates the principle of equal consideration. We are to weigh our suffering in not using animals against animal interests in avoiding suffering. If there is a conflict between human and animal interests and the human interest weighs more, then the animal suffering is justifiable. If there is no conflict, or if there is a conflict of interests but the animal interest weighs more, then we are not justified in using the animal. And if there is a conflict of interests but the interests at stake are similar, then we should presumably treat those interests in the same way and impose suffering on neither or both unless there is some nonarbitrary reason that justifies differential treatment. Moreover, the humane treatment principle as it developed historically explicitly included the principle of equal consideration. Bentham recognized that the only way to ensure that animal interests in not suffering were taken seriously was to apply the principle of equal consideration to animals, and Bentham's position therefore "incorporated the essential basis of moral equality . . . by means of the formula: 'Each to count for one and none for more than one.'"[59] Animal suffering cannot be discounted or ignored based on the supposed lack of some characteristic other than sentience if animals are not to be "degraded into the class of *things*." But Bentham never questioned the property status of animals because he mistakenly believed that the principle of equal consideration could be applied to animals even if they are property.[60] Bentham's error was perpetuated through laws that purported to balance the interest of property owners and their property.

The problem is that, as we have seen, there can be no meaningful balancing of interests if animals are property. The property status of animals is a two-edged sword wielded against their interests. First, it acts as blinders that effectively block even our perception of their interests as similar to ours because human "suffering" is understood as any detriment to property owners. Second, in those instances in which human and animal interests are recognized as similar, animal interests will fail in the balancing because the property status of animals is

59. Peter Singer, *Animal Liberation* 5 (2d ed. 1990) (quoting Bentham).

60. *See infra* note 81 and accompanying text.

always a good reason not to accord similar treatment unless to do so would benefit property owners. Animal interests will almost always count for less than one; animals remain as they were before the nineteenth century—things without morally significant interests.

The application of the principle of equal consideration similarly failed in the context of North American slavery, which allowed some humans to treat others as property.[61] The institution of human slavery was structurally identical to the institution of animal ownership. Because a human slave was regarded as property, the slave owner was able to disregard all of the slave's interests if it was economically beneficial to do so, and the law generally deferred to the slave owner's judgment as to the value of the slave. As chattel property, slaves could be sold, willed, insured, mortgaged, and seized in payment of the owner's debts. Slave owners could inflict severe punishments on slaves for virtually any reason. Those who intentionally or negligently injured another's slave were liable to the owner in an action for damage to property. Slaves could not enter into contracts, own property, sue or be sued, or live as free persons with basic rights and duties.

It was generally acknowledged that slaves had an interest in not suffering: Slaves "are not rational beings. No, but they are the creatures of God, sentient beings, capable of suffering and enjoyment, and entitled to enjoy according to the measure of their capacities. Does not the voice of nature inform everyone, that he is guilty of wrong when he inflicts on them pain without necessity or object?"[62] Although there were laws that ostensibly regulated the use and treatment of slaves, they failed completely to protect slave interests. The law often contained exceptions that eviscerated any protection for the slaves. For example, North Carolina law provided that the punishment for the murder of a slave should be the

61. The principle of equal consideration also failed in other systems of slavery, but because of differences among these systems, I confine my description to North American slavery. For a discussion of various systems of slavery and slave law, see Alan Watson, *Slave Law in the Americas* (1989); Alan Watson, *Roman Slave Law* (1989); Alan Watson, "Roman Slave Law and Romanist Ideology," 37 Phoenix 53 (1983).

62. Chancellor Harper, "Slavery in the Light of Social Ethics," *in Cotton Is King, and Pro-Slavery Arguments* 549, 559 (E.N. Elliott ed., 1860).

same as for the murder of a free person, but this law "did not apply to an outlawed slave, nor to a slave 'in the act of resistance to his lawful owner,' nor to a slave 'dying under moderate correction.'"[63] A law that prohibits the murder of slaves but permits three general and easily satisfied exceptions, combined with a general prohibition against the testimony of slaves against free persons, cannot effectively deter the murder of slaves. That the law refused to protect the interests of slaves against slave owners is underscored in *State v. Mann*, in which the court held that even the "cruel and unreasonable battery" of one's own slave is not indictable: Courts cannot "allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master."[64] To the extent that the law regulated the conduct of slave owners, it had nothing to do with concern for the interests of the slaves. For example, in *Commonwealth v. Turner*, the court determined that it had no jurisdiction to try the defendant slave owner, who beat his slave with "rods, whips and sticks," and held that even if the beating was administered "wilfully and maliciously, violently, cruelly, immoderately, and excessively," the court was not empowered to act as long as the slave did not die.[65] The court distinguished private beatings from public chastisement; the latter might subject the master to liability "not because it was a slave who was beaten, nor because the act was unprovoked or cruel; but, because ipso facto it disturbed the harmony of society; was offensive to public decency, and directly tended to a breach of the peace. The same would be the law, if a horse had been so beaten."[66]

Slave welfare laws failed for precisely the same reason that animal welfare laws fail to establish any meaningful limit on our use of animal property. The

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63. Stanley Elkins and Eric McKitrick, "Institutions and the Law of Slavery: Slavery in Capitalist and Non-Capitalist Cultures," *in The Law of American Slavery* 111, 115 (Kermit L. Hall ed., 1987) (quoting William Goodell, *The American Slave Code in Theory and Practice* 180 (1853)). For a discussion of slave law in the context of animal welfare law, see Francione, *supra* note 6, at 86–90; Francione, *supra* note 10, at 100–12.

64. 13 N.C. (2 Dev.) 263, 267 (1829).

65. 26 Va. (5 Rand.) 678, 678 (1827).

66. *Id.* at 680.

owner's property interest in the slave always trumped any interest of the slave who was ostensibly protected under the law. The interests of slaves were observed only when it provided an economic benefit for the owners or served their whim. Alan Watson has noted that "[a]t most places at most times a reasonably economic owner would be conscious of the chattel value of slaves and thus would ensure some care in their treatment."[67] Any legal limitations on the cruelty of slave owners reflected the concern that they should not use their property in unproductive ways; as expressed by the Roman jurist Justinian, "'it is to the advantage of the state that no one use his property badly.'"[68] Although some slave owners were more "humane" than others and some even treated slaves as family members, any kind treatment was a matter of the master's charity and not of the slave's right, and slavery as a legal institution had the inevitable effect of treating humans as nothing more than commodities. The principle of equal consideration had no meaningful application to the interests of a human whose only value was as a resource belonging to others. Slaves were rarely considered to have any interests similar to slave owners or other free persons; in those instances in which interests were recognized as similar, the property status of the slave was always a good reason not to accord similar treatment unless to do so would benefit the owner.

We eventually recognized that if humans were to have any morally significant interests, they could not be the resources of others and that race was not a sufficient reason to treat certain humans as property.[69] Although we tolerate varying degrees of exploitation, and we may disagree about what constitutes equal treatment, we no longer regard it as legitimate to treat any humans, irrespective of

67. Watson, *Slave Law in the Americas*, *supra* note 61, at xiv.

68. *Id.* at 31 (quoting Justinian).

69. Even after the abolition of slavery, race continued to serve as a reason to justify differential treatment, often on the ground that whites and people of color did not have similar interests and, therefore, did not have to be treated equally in certain respects, and often on the ground that race was a reason to deny similar treatment to admittedly similar interests. But abolition recognized that, irrespective of race, all humans had a similar interest in not being treated as the property of others.

their particular characteristics, as the property of others. Indeed, in a world deeply divided on many moral issues, one of the few norms steadfastly endorsed by the international community is the prohibition of human slavery. It matters not whether the particular form of slavery is "humane" or not; we condemn all human slavery. More brutal forms of slavery are worse than less brutal forms, but we prohibit human slavery in general because all forms of slavery more or less allow the interests of slaves to be ignored if it provides a benefit to slave owners, and humans have an interest in not suffering the deprivation of their fundamental interests merely because it benefits someone else, however "humanely" they are treated. It would, of course, be incorrect to say that human slavery has been eliminated from the planet. But the peremptory norms in international law—those few, select rules regarded as of such significance that they admit of no derogation by any nation—include the prohibition of slavery, which humanity deems so odious that no civilized nation can bear its existence.

The interest of a human in not being the property of others is protected by a right. When an interest is protected by a right, the interest may not be ignored or violated simply because it will benefit others. Rights are "moral notions that grow out of respect for the individual. They build protective fences around the individual. They establish areas where the individual is entitled to be protected against the state and the majority *even where a price is paid by the general welfare*."[70] If we are going to recognize and protect the interest of humans in not being treated as property, then we must use a right to do so; if we do not, then those humans who do not have this protection will be treated merely as commodities whenever it will benefit others. Therefore, the interest in not being treated as property must be protected against being traded away even if a price is paid by the general welfare.

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70. Bernard E. Rollin, "The Legal and Moral Bases of Animal Rights," *in Ethics and Animals* 103, 106 (Harlan B. Miller & William H. Williams eds., 1983). *See* Francione, *supra* note 6, at xxvi–xxx. For a general discussion of the concept of rights and rights theory in the context of laws concerning animals, see Francione, *supra* note 10, at 91–114.

The right not to be treated as the property of others is basic and different from any other rights we might have because it is the grounding for those other rights; it is a prelegal right that serves as the precondition for the possession of morally significant interests. The basic right is the right to the equal consideration of one's fundamental interests; it recognizes that if some humans have value only as resources, then the principle of equal consideration will have no meaningful application to their interests. Therefore, the basic right must be understood as prohibiting human slavery, or any other institutional arrangement that treats humans *exclusively* as means to the ends of others and not as ends in themselves.[71]

The protection afforded by the basic right not to treated as property is limited. The basic right does not guarantee equal treatment in all respects nor protect humans from all suffering, but it protects all humans, irrespective of their particular characteristics, from suffering any deprivation of interests as the result of being used exclusively as the resources of others and thereby provides essential protections. We may not enslave humans nor, for that matter, may we exert total control over their bodies by using them as we do laboratory animals, or as forced organ donors, or as raw materials for shoes, or as objects to be hunted for sport or tortured—irrespective of whether we claim to treat them "humanely" in the

71. Similar concepts have been recognized by philosophers and political theorists. Kant, for example, maintained that there is one "innate" right—the right of "innate *equality*," or the "independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being *his own master*." Immanuel Kant, *The Metaphysics of Morals*, §§ 6:237–38, at 30 (Mary Gregor trans. & ed., Cambridge Univ. Press 1996). This innate right "grounds our right to *have* rights." Roger J. Sullivan, *Immanuel Kant's Moral Theory* 248 (1989). The basic right not to be treated as property is different from what are referred to as natural rights insofar as these are understood to be rights that exist apart from their recognition by any particular legal system because they are granted by God. For example, John Locke regarded property rights as natural rights that were grounded in God's grant to humans of dominion over the earth and animals. The basic right not to be treated as property expresses a proposition of logic. If human interests are to have moral significance (i.e., if human interests are to be treated in accordance with the principle of equal consideration), then humans cannot be the property of other humans. For a further discussion of this basic right and the related concept of inherent value, see Francione, *supra* note 6, at 92–100. *See also* Henry Shue, *Basic Rights* (2d ed. 1996).

process.[72] An employer may treat her employees instrumentally and disregard their interest in a midmorning coffee break, or even their interest in health care, in the name of profit. But there are limits. She cannot force her employees to work without compensation. Pharmaceutical companies cannot test new drugs on employees who have not consented. Food-processing plants cannot make hot dogs or luncheon meats out of workers. To possess the basic right not to be treated as property is a minimal prerequisite to being a moral and legal *person*; it does not specify what other rights the person may have. Indeed, the rejection of slavery is required by any moral theory that purports to accord moral significance to the interests of all humans even if the particular theory otherwise rejects rights.[73]

Animals, like humans, have an interest in not suffering, but, as we have seen, the principle of equal consideration has no meaningful application to animal interests if they are the property of others just as it had no meaningful application to the interests of slaves. The interests of animals as property will almost always count for less than do the interests of their owners. Some owners may choose to treat their animals well, or even as members of their families as some do with their pets, but the law will generally not protect animals against their owners. Animal ownership as a legal institution inevitably has the effect of treating animals as commodities. Moreover, animals, like humans, have an interest in not suffering at all from the ways in which we use them, however "humane" that use may be. To the extent that we protect humans from being used in these ways and we do not extend the same protection to animals, we fail to accord equal consideration to animal interests in not suffering.

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72. Human experimentation is prohibited by the Nuremberg Code and the Helsinki Declaration. Torture is prohibited by the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The notable exception to the protection provided by the basic right is compulsory military service, which is controversial precisely because it does treat humans exclusively as means to the ends of others in ways that other acts required by the government, such as the payment of taxes, do not.

73. *See* Francione, *supra* note 6, at 94, 131–33. *See also supra* note 71; *infra* note 78 and accompanying text.

If we are going to take animal interests seriously, we must extend to animals the one right that we extend to all humans irrespective of their particular characteristics. To do so would not mean that animals would be protected from all suffering. Animals in the wild may be injured, or become diseased, or may be attacked by other animals. But it would mean that animals could no longer be used as the resources of humans and would, therefore, be protected from suffering at all from such uses. Is there a morally sound reason not to extend to animals the right not to be treated as property, and thereby recognize that our obligation not to impose unnecessary suffering on them is really an obligation not to treat them as property? Or, to ask the question in another way, why do we deem it acceptable to eat animals, hunt them, confine and display them in circuses and zoos, use them in experiments or rodeos, or otherwise to treat them in ways in which we would never think it appropriate to treat any human irrespective of how "humanely" we were to do so?

The usual response claims that some empirical difference between humans and animals constitutes a good reason for not according to animals the one right we accord to all humans. According to this view, there is some qualitative distinction between humans and animals (all species considered as a single group) that purportedly justifies our treating animals as our property. This distinction almost always concerns some difference between human and animal minds; we have some mental characteristic that animals lack, or are capable of certain actions of which animals are incapable as a result of our purportedly superior cognitive abilities. The list of characteristics that are posited as possessed only by humans includes self-consciousness, reason, abstract thought, emotion, the ability to communicate, and the capacity for moral action.[74] We claimed to reject the

74. Some claim that the relevant difference between humans and nonhumans is that the former possess souls and the latter do not. For a discussion of this and other purported differences, see Francione, *supra* note 6, at 103–29. *See also supra* note 9 and accompanying text. I do not mean to suggest that everyone after 1800 who has relied on these differences to justify our treatment of animals as resources acknowledges that animals have any morally significant interests; indeed, some accept and defend the status of animals as things morally indistinguishable from inanimate objects. *See, e.g.*, Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (1992).

relevance of these characteristics 200 years ago when we supposedly embraced the idea that the capacity to suffer was the only attribute needed to ground our moral obligation to animals not to impose unnecessary suffering on them. Yet, the absence of these same characteristics continues to serve as our justification for treating animals as our resources and has been used to keep animals "degraded into the class of *things*" despite our claim to take animal interests seriously.

The problem started with Bentham himself.[75] Although Bentham's analysis of slavery is not entirely clear, he opposed human slavery at least in part because the principle of equal consideration would not apply to humans who are slaves. He acknowledged that a particular slave owner might treat a slave well and that some forms of slavery were better than others, but "slavery once established, was always likely to be the lot of large numbers. 'If the evil of slavery were not great its extent alone would make it considerable.'"[76] Slavery as an institution would inevitably result in humans being treated as things and "abandoned without redress to the caprice of a tormentor."[77] Slaves would necessarily count for less than did those who were not slaves. Bentham regarded the concept of moral rights as nonsense, but he did, in effect, recognize that humans had a right not to be treated as property.[78] He noted that just as the color of skin was an insufficient reason to abandon humans to the caprice of a tormentor, "the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally

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75. For a discussion of the views of Bentham and his modern proponent, Peter Singer, see Francione, *supra* 6, at 130–50.

76. H.L.A. Hart, *Essays on Bentham* 97 (1982) (quoting Bentham).

77. Bentham, *supra* note 12, at 282–83 n.b. (further note omitted).

78. I recognize that most Bentham scholars regard Bentham's objections to slavery to be based exclusively on the consequences of slavery and claim that Bentham did not think that slavery violated any moral right. It appears, however, that Bentham, who is generally regarded as an act utilitarian, was at the very least a rule utilitarian when it came to slavery; that is, he thought that the consequences of the institution of slavery were necessarily undesirable and, in effect, he recognized that the human interest in not being treated as a resource should be accorded rights-type protection. Moreover, Bentham did talk in terms of moral rights when he discussed human slavery and the treatment of animals, *see id.*, although he was probably referring to the right to equal consideration in that passage. Bentham may well have recognized on some level that a right to equal consideration is inconsistent with the status of being a slave. *See* Francione, *supra* note 6, at 132–33.

insufficient for abandoning a sensitive being to the same fate."[79] Why, then, did Bentham not reject the treatment of animals as property as he had rejected the treatment of humans as property?

The answer is related to Bentham's view that animals, like humans, have interests in not suffering but, unlike humans, have no interest in their continued existence. That is, Bentham believed that animals do not have a sense of self; they live moment to moment and have no continuous mental existence. Their minds consist of collections of unconnected sensations of pain and pleasure. On this view, death is not a harm for animals; animals do not care about whether we eat them, or use and kill them for other purposes, as long as we do not make them suffer in the process: "If the being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have."[80] Although Bentham explicitly rejected the position that, because animals lack characteristics beyond sentience, such as self-awareness, we could treat them as things, he maintained that because animals lack this characteristic, we do not violate the principle of equal consideration by using animals as our resources as long as we give equal consideration to their interests in not suffering.

Bentham's position is problematic for several reasons. Bentham failed to recognize that although particular animal owners might treat their animal property kindly, institutionalized animal exploitation would, like slavery, become "the lot of large numbers," and animals would necessarily be treated as economic commodities that were, like slaves, "abandoned without redress to the caprice of a

79. Bentham, *supra* note 12, at 282–83 n.b.

80. *Id.* Bentham also claimed that "[t]he death [that animals] suffer in our hands commonly is, and always may be, a speedier, and by that means a less painful one, than that which would await them in the inevitable course of nature." *Id.* Bentham ignored the fact that the domestic animals that we raise for food would not have a death "in the inevitable course of nature," because they are only brought into existence as our resources in the first place. It is, therefore, problematic to defend the killing of domestic animals by comparing their deaths with those of wild animals, saying that the infliction of unnecessary pain on domestic animals that we do not need to eat is less than the pain that may necessarily be suffered by wild animals.

tormentor." Moreover, Bentham never explained how to apply the principle of equal consideration to animals who were the property of humans.[81] But most important, Bentham was simply wrong to claim that animals are not self-aware and have no interest in their lives.

Sentience is not an end in itself. It is a means to the end of staying alive. Sentient beings use sensations of pain and suffering to escape situations that threaten their lives and sensations of pleasure to pursue situations that enhance their lives. Just as humans will often endure excruciating pain in order to remain alive, animals will often not only endure but inflict on themselves excruciating pain—as when gnawing off a paw caught in a trap—in order to live. Sentience is what evolution has produced in order to ensure the survival of certain complex organisms. To claim that a being who has evolved to develop a consciousness of

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81. Peter Singer, who, like Bentham, is a utilitarian and eschews moral rights, adopts Bentham's position and argues that most animals do not have an interest in their lives, but that the principle of equal consideration can nevertheless be applied to their interests in not suffering even if animals are the property of humans. Singer's argument fails in a number of respects. First, Singer requires that we make interspecies comparisons of pain and suffering in order to apply the principle of equal consideration to animal interests. *See* Singer, *supra* note 59, at 15. Such comparisons are inherently difficult (if not impossible) to make. Second, because most humans are self-aware and most animals are not (in Singer's view), it is difficult to understand how animals and humans will ever be considered as similarly situated for purposes of equal consideration. Singer recognizes that because we are unlikely to regard human and animal interests as similar in the first place, we are also unlikely to find any guidance in the principle of equal consideration. *Id.* at 16. That is, however, tantamount to admitting that animal interests are not morally significant because the principle of equal consideration will never have any meaningful application to animal interests. Singer avoids this conclusion by claiming that even if the principle of equal consideration is inapplicable, it is still clear that much animal suffering is not morally justifiable. He states, for example, that we need not apply the principle of equal consideration in order to conclude that the positive consequences for animals of abolishing intensive agriculture would be greater than any detrimental consequences for humans. It remains unclear how Singer can arrive at this conclusion other than through mere stipulation. The abolition of intensive agriculture would have a profound impact on the international economy and would cause an enormous rise in the price of meat and animal products. If the issue hinges only on consequences, it is not at all clear that the consequences for self-aware humans would not be weightier than the consequences for non-self-aware animals. Fourth, even if Singer's theory would lead to more "humane" animal treatment, it would still permit us to use animals as resources in ways that we do not use any humans. Singer's response to this would be that he would be willing to use similarly situated humans, such as the mentally or physically disabled, as replaceable resources. *Id.*; *see also* Peter Singer, *Practical Ethics* 186 (2d ed. 1993). For the reasons discussed below, most of us would reject Singer's views on the use of vulnerable humans. *See infra* notes 95–97 and accompanying text. For a discussion of Singer's views, see Francione, *supra* note 6, at 135–48; Francione, *Rain Without Thunder*, *supra* note 56, at 156–60, 173–76.

pain and pleasure has no interest in remaining alive is to say that conscious beings have no interest in remaining conscious, a most peculiar position to take.

Moreover, the proposition that humans have mental characteristics wholly absent in animals is inconsistent with the theory of evolution. Darwin maintained that there are no uniquely human characteristics: "[T]he difference in mind between man and the higher animals, great as it is, is certainly one of degree and not of kind."[82] Animals are able to think, and possess many of the same emotional responses as do humans: "[T]he senses and intuitions, the various emotions and faculties, such as love, memory, attention, curiosity, imitation, reason, etc., of which man boasts, may be found in an incipient, or even sometimes in a well-developed condition, in the lower animals."[83] Darwin noted that "associated animals have a feeling of love for each other" and that animals "certainly sympathise with each other's distress or danger."[84]

Even if we cannot know the precise nature of animal self-awareness, it appears that *any* being that is aware on a perceptual level must be self-aware and have a continuous mental existence. Biologist Donald Griffin has observed that if animals are conscious of anything, "the animal's own body and its own actions must fall within the scope of its perceptual consciousness."[85] Yet we deny animals self-awareness because we maintain that they cannot "think such thoughts as 'It is *I* who am running, or climbing this tree, or chasing that moth.'"[86] Griffin maintains that "when an animal consciously perceives the running, climbing, or moth-chasing of another animal, it must also be aware of who is doing these things. And if the animal is perceptually conscious of its own body, it is difficult to rule out similar recognition that it, itself, is doing the running, climbing, or

82. Charles Darwin, *The Descent of Man* 105 (Princeton Univ. Press 1981). *See* James Rachels, *Created from Animals: The Moral Implications of Darwinism* (1990).

83. Darwin, *supra* note 82, at 105.

84. *Id.* at 76, 77.

85. Donald R. Griffin, *Animal Minds: Beyond Cognition to Consciousness* 274 (2001).

86. *Id.*

chasing."[87] Griffin concludes that "[i]f animals are capable of perceptual awareness, denying them some level of self-awareness would seem to be an arbitrary and unjustified restriction."[88] Griffin's reasoning can be applied in the context of sentience. Any sentient being must have some level of self-awareness. To be sentient means to be the sort of being who recognizes that it is *that* being, and not some other, who is experiencing pain or distress. When a dog experiences pain, the dog necessarily has a mental experience that tells her "this pain is happening to me." In order for pain to exist, some consciousness—some*one*—must perceive it as happening to her and must prefer not to experience it.

Antonio Damasio, a neurologist who works with humans who have suffered strokes, seizures, and conditions that cause brain damage, maintains that such humans have what he calls "core consciousness." Core consciousness, which does not depend on memory, language, or reasoning, "provides the organism with a sense of self about one moment—now—and about one place—here."[89] Humans who experience transient global amnesia, for example, have no sense of the past or the future but do have a sense of self with respect to present events and objects, and such humans would most certainly regard death as a harm. Damasio maintains that many animal species possess core consciousness. He distinguishes core consciousness from what he calls "extended consciousness," which requires reasoning and memory, but not language, and involves enriching one's sense of self with autobiographical details and what we might consider a representational sense of consciousness. Extended consciousness, of which there are "many levels and grades," involves a self with memories of the past, anticipations of the future, and awareness of the present.[90] Although Damasio argues that extended consciousness reaches its most complex level in humans, who have language and

87. *Id.*

88. *Id.*

89. Antonio R. Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* 16 (1999).

90. *Id.*

sophisticated reasoning abilities, he maintains that chimpanzees, bonobos, baboons, and even dogs may have an autobiographical sense of self.[91] Even if most animals do not have extended consciousness, most of the animals we routinely exploit undoubtedly have at least core consciousness, which means that they are self-conscious. In short, the fact that animals may not have an autobiographical sense of their lives (or one that they can communicate to us) does not mean that they do not have a continuous mental existence, or that they do not have an interest in their lives, or that killing them makes no difference to them.

Cognitive ethologists and others have confirmed that animals, including mammals, birds, and even fish, have many of the cognitive characteristics once thought to be uniquely human.[92] Animals possess considerable intelligence and are able to process information in sophisticated and complex ways. They are able to communicate with other members of their own species as well as with humans; indeed, there is considerable evidence that nonhuman great apes can communicate using symbolic language. The similarities between humans and animals are not limited to cognitive or emotional attributes alone. Some argue that animals exhibit what is clearly moral behavior as well. For example, Frans de Waal states that "honesty, guilt, and the weighing of ethical dilemmas are traceable to specific areas of the brain. It should not surprise us, therefore, to find animal parallels. The human brain is a product of evolution. Despite its larger volume and greater complexity, it is fundamentally similar to the central nervous system of other mammals."[93] There are numerous instances in which animals act in altruistic ways toward unrelated members of their own species and toward other species, including humans.

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91. *See id.* at 198, 201.

92. *See*, *e.g.*, Griffin, *supra* note 85; Marc D. Hauser, *The Evolution of Communication* (1996); Marc D. Hauser, *Wild Minds: What Animals Really Think* (2000); *Readings in Animal Cognition* (Marc Bekoff & Dale Jamieson eds., 1996); Sue Savage-Rumbaugh & Roger Lewin, *Kanzi: The Ape at the Brink of the Human Mind* (1994).

93. Frans de Waal, *Good-Natured: The Origins of Right and Wrong in Humans and Other Animals* 218 (1996).

Although it is clear that animals other than humans possess characteristics purported to be unique to humans, it is also clear that there are differences between humans and other animals. For example, even if animals are self-aware on some level, that does not mean that animals can recognize themselves in mirrors (although some nonhuman primates do) or keep diaries or anticipate the future by looking at clocks and calendars; even if animals have the ability to reason or think abstractly, that does not mean that they can do calculus or compose symphonies. Yet for at least two related reasons, the humanlike varieties of these characteristics cannot serve to provide a morally sound, nonarbitrary basis for denying the right not to be treated as property to animals who may lack these characteristics.[94]

First, any attempt to justify treating animals as resources based on their lack of supposed uniquely human characteristics begs the question from the outset by assuming that certain human characteristics are special and justify differential treatment. Even if, for instance, no animals other than humans can recognize themselves in mirrors or can communicate through symbolic language, no human is capable of flying, or breathing underwater, without assistance. What makes the

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94. There are problems in relying on similarities between humans and animals beyond sentience to justify the moral significance of animals. *See* Francione, *supra* note 6, at 116–19. For example, a focus on similarities beyond sentience threatens to create new hierarchies in which we move some animals, such as the great apes or dolphins, into a preferred group, and continue to treat other animals as our resources. There has for some years been an international effort to secure certain rights for the nonhuman great apes. This project was started by the publication of a book entitled *The Great Ape Project* (Paola Cavalieri & Peter Singer eds., 1993), which seeks "the extension of the community of equals to include all great apes: human beings, chimpanzees, gorillas, and orangutans." *Id.* at 4. I was a contributor to *The Great Ape Project*. *See* Gary L. Francione, "Personhood, Property, and Legal Competence," *in id.* at 248–57. The danger of *The Great Ape Project* is that it reinforces the notion that characteristics beyond sentience are necessary and not merely sufficient for equal treatment. In my essay in *The Great Ape Project*, I tried to avoid this problem by arguing that although the considerable cognitive and other similarities between the human and nonhuman great apes are sufficient to accord the latter equal protection under the law, these similarities are not necessary for animals to have a right not to be treated as resources. *See id.* at 253. *See also* Lee Hall & Anthony Jon Waters, "From Property to Person: The Case of Evelyn Hart," 11 Seton Hall Const. L.J. 1 (2000). For an approach that argues that characteristics beyond sentience are necessary and not merely sufficient for preferred animals to have a right not to be treated as resources in at least some respects, see Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (2002), and Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (2000).

ability to recognize oneself in a mirror or use symbolic language better in a moral sense than the ability to fly or breathe underwater? The answer, of course, is that *we* say so. But apart from our proclamation, there is simply no reason to conclude that characteristics thought to be uniquely human have any value that allows us to use them as a nonarbitrary justification for treating animals as property. These characteristics can serve this role only after we have assumed their moral relevance.

Second, even if all animals other than humans lack a particular characteristic beyond sentience, or possess it to a different degree than do humans, there is no logically defensible relationship between the lack or lesser degree of that characteristic and our treatment of animals as resources. Differences between humans and other animals may be relevant for other purposes—no sensible person argues that we ought to enable nonhuman animals to drive cars or vote or attend universities—but the differences have no bearing on whether animals should have the status of property. We recognize this inescapable conclusion where humans are involved. Whatever characteristic we identify as uniquely human will be seen to a lesser degree in some humans and not at all in others.[95] Some humans will have the exact same deficiency that we attribute to animals, and although the deficiency may be relevant for some purposes, most of us would reject enslaving such humans, or otherwise treating such humans exclusively as means to the ends of others.

Consider, for instance, self-consciousness. Peter Carruthers defines self-consciousness as the ability to have a "conscious experience . . . whose existence and content are available to be consciously thought about (that is, available for description in acts of thinking that are themselves made available to further acts

95. Some argue that although certain humans may lack a particular characteristic, the fact that all humans have the potential to possess the characteristic means that a human who actually lacks it is for purposes of equal consideration distinguishable from an animal who may also lack it. *See*, e.g., Carl Cohen, "The Case for the Use of Animals in Biomedical Research," 315 New Eng. J. Med. 865 (1986). This argument begs the question because it assumes that some humans have a characteristic that they lack and thereby ignores the factual similarity between animals and humans who lack the characteristic. Moreover, in some instances, animals may possess the characteristic to a greater degree than do some humans.

of thinking)."[96] According to Carruthers, humans must have what Damasio refers to as the most complex level of extended consciousness, or a language-enriched autobiographical sense of self, in order to be self-conscious. But many humans, such as the severely mentally disabled, do not have self-consciousness in that sense; we do not, however, regard it as permissible to use them as we do laboratory animals, or to enslave them to labor for those without their particular disability. Nor should we. We recognize that a mentally disabled human has an interest in her life and in not being treated exclusively as a means to the ends of others even if she does not have the same level of self-consciousness that is possessed by normal adults; in this sense, she is similarly situated to all other sentient humans, who have an interest in being treated as ends in themselves irrespective of their particular characteristics. Indeed, to say that a mentally disabled person is not similarly situated to all others for purposes of being treated exclusively as a resource is to say that a less intelligent person is not similarly situated to a more intelligent person for purposes of being used, for instance, as a forced organ donor. The fact that the mentally disabled human may not have a particular sort of self-consciousness may serve as a nonarbitrary reason for treating her differently in some respects—it may be relevant to whether we make her the host of a talk show, or give her a job teaching in a university, or allow her to drive a car—but it has no relevance to whether we treat her exclusively as a resource and disregard her fundamental interests, including her interest in not suffering and in her continued existence, if it benefits us to do so.

The same analysis applies to every human characteristic beyond sentience that is offered to justify treating animals as resources. There will be some humans who also lack this characteristic, or possess it to a lesser degree than do normal humans. This "defect" may be relevant for some purposes, but not for whether we treat humans exclusively as resources. We do not treat as things those humans

96. Carruthers, *supra* note 74, at 181. Peter Singer also requires this sort of self-consciousness before animals or humans can be considered to have an interest in their lives. *See* Singer, *supra* note 59, at 228–29. *See also supra* note 81.

who lack characteristics beyond sentience simply out of some sense of charity. We realize that to do so would violate the principle of equal consideration by using an arbitrary reason to deny similar treatment to similar interests in not being treated exclusively as a means to the ends of others.[97] "[T]he question is not, Can they *reason*? nor, Can they*talk* ? but, Can they *suffer*?"

In sum, there is no characteristic that serves to distinguish humans from all other animals for purposes of denying to animals the one right that we extend to all humans. Whatever attribute we may think makes all humans special and thereby deserving of the right not to be the property of others is shared by nonhumans. More important, even if there are uniquely human characteristics, some humans will not possess those characteristics, but we would never think of using such humans as resources. In the end, the only difference between humans and animals is species, and species is not a justification for treating animals as property any more than is race a justification for human slavery.

Animals as "Persons"

If we extend the right not to be property to animals, then animals will become moral persons. To say that a being is a person is merely to say that the being has morally significant interests, that the principle of equal consideration applies to that being, that the being is not a thing. In a sense, we already accept that animals are persons; we claim to reject the view that animals are things and to recognize that, at the very least, animals have a morally significant interest in not suffering. Their status as property, however, has prevented their personhood from being realized.

The same was true of human slavery. Slaves were regarded as chattel property. Laws that provided for the "humane" treatment of slaves did not make slaves persons because, as we have seen, the principle of equal consideration

97. In this sense, the equality of all humans is predicated on factual similarities shared by all humans irrespective of their particular characteristics beyond sentience. All humans have an interest in not being treated exclusively as means to the ends of others. All humans value themselves even if no one else values them. *See* Francione, *supra* note 6, at 128, 135 n.18. Moreover, justice (not charity) may require that we be especially conscientious about protecting humans who lack certain characteristics precisely because of their vulnerability.

could not apply to slaves. We tried, through slave welfare laws, to have a three-tiered system: things, or inanimate property; persons, who were free; and in the middle, depending on your choice of locution, "quasi-persons" or "things plus"—the slaves. That system could not work. We eventually recognized that if slaves were going to have morally significant interests, they could not be slaves any more, for the moral universe is limited to only two kinds of beings: persons and things. "Quasi-persons" or "things plus" will necessarily risk being treated as things because the principle of equal consideration cannot apply to them.

Nor can we use animal welfare laws to render animals "quasi-persons" or "things plus." They are either persons, beings to whom the principle of equal consideration applies and who possess morally significant interests in not suffering, or things, beings to whom the principle of equal consideration does not apply and whose interests may be ignored if it benefits us. There is no third choice. We could, of course, treat animals better than we do; there are, however, powerful economic forces that militate against better treatment in light of the status of animals as property. But simply according better treatment to animals would not mean that they were no longer things. It may have been better to beat slaves three rather than five times a week, but this better treatment would not have removed slaves from the category of things. The similar interests of slave owners and slaves were not accorded similar treatment because the former had a right not to suffer at all from being used exclusively as a resource, and the latter did not possess such a right. Animals, like humans, have an interest in not suffering at all from the ways in which we use them, however "humane" that use may be. To the extent that we protect humans from suffering from these uses and we do not extend the same protection to animals, we fail to accord equal consideration to animal interests in not suffering.

If animals are persons, that does not mean that they are human persons; it does not mean that we must treat animals in the same way that we treat humans or that we must extend to animals any of the legal rights that we reserve to competent humans. Nor does this mean that animals have any sort of guarantee of

a life free from suffering, or that we must protect animals from harm from other animals in the wild or from accidental injury by humans. As I argue below, it does not necessarily preclude our choosing human interests over animal interests in situations of genuine conflict. But it does require that we accept that we have a moral obligation to stop using animals for food, entertainment, or clothing, or any other uses that assume that animals are merely resources, and that we ultimately prohibit the ownership of animals. We should, of course, care for those domestic animals presently in existence, but we should stop producing animals for human purposes. The abolition of animal slavery is required by any moral theory that purports to treat animal interests as morally significant, even if the particular theory otherwise rejects rights, just as the abolition of human slavery is required by any theory that purports to treat human interests as morally significant.[98]

False Conflicts

The question of the moral status of animals addresses the matter of how we ought to treat animals in situations of conflict between human and animal interests. For the most part, our conflicts with animals are those that we create. We bring billions of sentient animals into existence for the sole purpose of killing them. We then seek to understand the nature of our moral obligations to these animals. Yet by bringing animals into existence for uses that we would never consider appropriate for any humans, we have already placed nonhuman animals outside the scope of our moral community altogether. Despite what we say about taking

98. *See supra* notes 73, 78 and accompanying text; Francione, *supra* note 6, at 148. The theory presented in this essay is different in significant respects from that of Tom Regan. *See* Tom Regan, *The Case for Animal Rights* (1983). Regan argues that animals have rights and that animal exploitation ought to be abolished and not merely regulated, but he limits protection to those animals who have preference autonomy, and he thereby omits from the class of rights holders those animals who are sentient but who do not have preference autonomy. The theory discussed in this essay applies to any sentient being. Regan uses the concept of basic rights and although he does not discuss the status of animals as property or the basic right not to be property, he maintains that some animals should be accorded the right not to be treated exclusively as means to human ends. Moreover, Regan does not acknowledge that this basic right can be derived solely from applying the principle of equal consideration to animal interests in not suffering, nor that the right must be part of any theory that purports to accord moral significance to animal interests even if that theory otherwise rejects rights. For a further discussion of the differences between my theory and that of Regan, see Francione, *supra* note 6, at xxxii–xxxiv, 94 n.25, 127–28 n.61, 148 n.36, 174 n.1.

animals seriously, we have already decided that the principle of equal consideration does not apply to animals and that animals are things that have no morally significant interests.

Because animals are property, we treat every issue concerning their use or treatment as though it presented a genuine conflict of interests, and invariably we choose the human interest over the animal interest even when animal suffering can be justified only by human convenience, amusement, or pleasure. In the overwhelming number of instances in which we evaluate our moral obligations to animals, however, there is no true conflict. When we contemplate whether to eat a hamburger, buy a fur coat, or attend a rodeo, we do not confront any sort of conflict worthy of serious moral consideration. If we take animal interests seriously, we must desist from manufacturing such conflicts, which can only be constructed in the first place by ignoring the principle of equal consideration and by making an arbitrary decision to use animals in ways in which we rightly decline to use any human.

Does the use of animals in experiments involve a genuine conflict between human and animal interests? Even if a need for animals in research exists, the conflict between humans and animals in this context is no more genuine than a conflict between humans suffering from a disease and other humans we might use in experiments to find a cure for that disease. Data gained from experiments with animals require extrapolation to humans in order to be useful at all, and extrapolation is an inexact science under the best of circumstances. If we want data that will be useful in finding cures for human diseases, we would be better advised to use humans. We do not allow humans to be used as we do laboratory animals, and we do not think that there is any sort of conflict between those who are afflicted or who may become afflicted with a disease and those humans whose use might help find a cure for that disease. We regard all humans as part of the moral community, and although we may not treat all humans in the same way, we recognize that membership in the moral community at the very least precludes such use of humans. Animals have no characteristic that justifies our use of them

in experiments that is not shared by some group of humans; because we regard some animals as laboratory tools yet think it inappropriate to treat any humans in this way, we manufacture a conflict, ignoring the principle of equal consideration and treating similar cases in a dissimilar way.

There may, of course, be situations in which we are confronted with a true emergency, such as the burning house that contains an animal and a human, where we have time to save only one. Such emergency situations require what are, in the end, decisions that are arbitrary and not amenable to satisfying general principles of conduct. Yet even if we would always choose to save the human over the animal in such situations, it does not follow that animals are merely resources that we may use for our purposes.[99] We would draw no such conclusion when making a choice between two humans. Imagine that two humans are in the burning house. One is a young child; the other is an old adult, who, barring the present conflagration, will soon die of natural causes anyway. If we decide to save the child for the simple reason that she has not yet lived her life, we would not conclude that it is morally acceptable to enslave old people, or to use them for target practice. Similarly, assume that a wild animal is just about to attack a friend. Our choice to kill the animal in order to save the friend's life does not mean that it is morally acceptable to kill animals for food, any more than our moral justification in killing a deranged human about to kill our friend would serve to justify our using deranged humans as forced organ donors.

In sum, if we take animal interests seriously, we are not obliged to regard animals as the same as humans for all purposes any more than we regard all humans as being the same for all purposes; nor do we have to accord to animals all or most of the rights that we accord to humans. We may still choose the human over the animal in cases of genuine conflict—when it is truly necessary to do so—but that does not mean that we are justified in treating animals as resources

99. A common argument made against the animal rights position is that it is acceptable to treat animals as things because we are justified in choosing humans over animals in situations of conflict. *See, e.g.*, Richard A. Posner, "Animal Rights," Slate Dialogues, *at* http://slate.msn.com/id/110101/entry/110129/ (last visited Dec. 1, 2003).

for human use.[100] And if the treatment of animals as resources cannot be justified, then we should abolish the institutionalized exploitation of animals. We should care for domestic animals presently alive, but we should bring no more into existence. The abolition of animal exploitation could not, as a realistic matter, be imposed legally unless and until a significant portion of us took animal interests seriously. Our moral compass will not find animals while they are lying on our plates. In other words, we have to put our vegetables where our mouths are and start acting on the moral principles that we profess to accept.

If we stopped treating animals as resources, the only remaining human-animal conflicts would involve animals in the wild. Deer may nibble our ornamental shrubs; rabbits may eat the vegetables we grow. The occasional wild animal may attack us. In such situations, we should, despite the difficulty inherent in making interspecies comparisons, try our best to apply the principle of equal consideration and to treat similar interests in a similar way. This will generally require at the very least a good-faith effort to avoid the intentional killing of animals to resolve these conflicts, where lethal means would be prohibited if the conflicts involved only humans. I am, however, not suggesting that the recognition that animal interests have moral significance requires that a motorist who unintentionally strikes an animal be prosecuted for an animal equivalent of manslaughter. Nor do I suggest that we should recognize a cause of action allowing a cow to sue the farmer. The interesting question is why we have the cow here in the first instance.

100. The choice of humans over animals in situations of genuine emergency or conflict does not necessarily represent speciesism because there are many reasons other than species bias that can account for the choice. *See* Francione, *supra* note 6, at 159–62.